Supreme Court, U.S.
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No. 15-1248

IN THE

Supreme Court of the United States

MCLANE COMPANY, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF COURT-APPOINTED *AMICUS CURIAE* STEPHEN B. KINNAIRD DEFENDING THE JUDGMENT BELOW

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QUESTION PRESENTED

Whether a court of appeals should review *de novo* a district court's order to quash or enforce a subpoena issued by the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

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INTEREST OF AMICUS CURIAE

By order dated November 8, 2016, this Court appointed Stephen B. Kinnaird as *amicus curiae* counsel to defend the judgment of the court of appeals that a district court's decision to quash or enforce a subpoena issued by the Equal Employment Opportunity Commission ("EEOC" or "Commission") is subject to *de novo* review.[1]

RELEVANT STATUTORY PROVISIONS

In addition to the provisions reproduced by the parties, section 6 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 555, is relevant and reproduced in an addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background.

Title VII of the Civil Rights Act of 1964 declares certain forms of discrimination to be unlawful employment practices. 42 U.S.C. §§ 2000e-2, 2000e-3. Congress granted the EEOC the power "to prevent any person from engaging in any unlawful employment practice" described in the statute. *Id.* § 2000e-5(a).

"The Commission's enforcement responsibilities are triggered by the filing of a specific sworn charge of discrimination." *Univ. of Pa. v. EEOC*, 493 U.S. 182, 190 (1990); 42 U.S.C. § 2000e-5(a), (e). Because the EEOC is tasked with "[p]rimary responsibility for

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and his firm made a monetary contribution to this brief's preparation or submission.

enforcing Title VII," *EEOC v. Shell Oil Co.*, 466 U.S. 54, 61–62 (1984), such a charge is a precondition to a private Title VII lawsuit. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 360–61 (1977). To be valid—to satisfy this administrative exhaustion requirement—the sworn charge must "identify the parties [to the alleged discriminatory acts] and ... describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b).

Once a valid charge has been filed with the EEOC, either by an aggrieved individual or by a member of the Commission, the EEOC is required to "make an investigation thereof." 42 U.S.C. § 2000e-5(b). If, after investigating, the EEOC concludes that there is no "reasonable cause" to credit the allegations in the charge, it closes its investigation and issues a "right-to-sue" letter to the charging party, authorizing that party to proceed to litigation. *Id.* § 2000e-5(b), (f)(1)(A); *Univ. of Pa.*, 493 U.S. at 191 & n.4. If, on the other hand, the EEOC finds reasonable cause to believe the allegations, it must engage in "informal methods of conference, conciliation, and persuasion" to resolve the matter. 42 U.S.C. § 2000e-5(b); *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). If those efforts fail, the Commission can itself file suit against the employer. *Id.*

The EEOC's authority to investigate a charge is broad but not unbounded. Congress set a purposefully calibrated legal limit on that authority; the Commission may seek only evidence that is both "relate[d] to unlawful employment practices covered by [Title VII] and is relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a). The relevance

standard "afford[s] the Commission access to virtually any material that might cast light on the allegations against the employer." *Shell Oil*, 466 U.S. at 68–69. Nonetheless, the courts may not act "in a fashion that renders that requirement a nullity." *Id.* at 69.

The charge not only determines the scope of the EEOC's investigatory authority, but constrains the scope of any subsequent litigation. Because the EEOC's administrative process (investigation and conciliation) is a statutory precondition to litigation, *Mach Mining*, 135 S. Ct. at 1651, a "Title VII suit may extend as far as, but not beyond, the parameters of the underlying administrative charge." *Jorge v. Rumsfeld*, 404 F.3d 556, 565 (1st Cir. 2005); 2 Barbara T. Lindemann & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 29-26–28 (5th ed. 2012).

In conducting an investigation, the EEOC issues "Requests for Information" and seeks voluntary compliance. *See* 1 *EEOC Compliance Manual* §§ 26.2, 26.3. "When evidence is available [but] the respondent [employer] has refused to produce it, [the EEOC can] obtain the evidence by issuance of a subpoena." *Id.* § 26.1(d). Title VII grants the EEOC the investigatory powers afforded the National Labor Relations Board ("NLRB"), including the power of subpoena, by section 11 of the National Labor Relations Act ("NLRA"). 42 U.S.C. § 2000e-9; 29 U.S.C. § 161.

A responding employer may petition the Commission to revoke or modify the subpoena, and the Commission may do so in its discretion "if in its

opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required." 29 U.S.C. § 161(1) (emphasis added); 1 *EEOC Compliance Manual* § 24.12(a)(1), (b). If the Commission rejects the employer's petition, and the employer still refuses to produce subpoenaed materials, the Commission may ask a district court to compel production. 29 U.S.C. § 161(2); *Univ. of Pa.*, 493 U.S. at 191.

B. Proceedings Below.

1. In 2008, Damiana Ochoa filed a Title VII charge with the EEOC. JA 41–43. The charge alleged that McLane Southwest, a subsidiary of Petitioner McLane Company, Inc. ("McLane"), engaged in sex discrimination based on pregnancy. JA 42–43. Ms. Ochoa's charge also asserted possible discrimination under the Americans with Disabilities Act of 1990 ("ADA"). JA 43.

The allegations of discrimination stemmed from McLane's use of the Industrial Physical Capacity Services Physical Capacity Exam ("PCE"), which Ms. Ochoa was required to take before returning to work from maternity leave. JA 42–43, 51–52. Ms. Ochoa claimed that McLane required such strength tests of "all employees returning to work from a medical leave and all new hires, regardless of job position." JA 43. After failing three attempts to pass the strength test following her pregnancy, Ms. Ochoa was ultimately fired. JA 42. Based on McLane's use of the PCE, the Commission itself filed a second charge

against McLane asserting possible violations of the Age Discrimination in Employment Act of 1967 ("ADEA"). Pet. App. 19.

In 2010, the EEOC sent the McLane subsidiary a letter notifying the company that the Commission was conducting an investigation of McLane based on both Ms. Ochoa's charge and the ADEA charge. JA 79–82. The EEOC asked for (among other items) pedigree information of McLane employees who took the PCE—*i.e.*, their names, dates of birth, social security numbers and contact information—along with the reason the person took the test, the person's score on the test, any relevant medical condition, and any adverse action that McLane took based on the person's performance on the test. JA 86–88.

After receiving an initial disclosure from McLane, the EEOC expanded its request to include information about applicants and employees at McLane's nationwide grocery division. *See* JA 80, 82; Pet. App. 4. McLane provided a database that identified employees and applicants who took the PCE by an employee number, and disclosed their gender and whether they passed the test. Pet. App. 3–4. The database did not disclose (among other things) pedigree information that would allow the EEOC to identify and contact test takers. *Id.*

McLane objected to the EEOC's demand for this information, arguing that the request was overbroad and not relevant to Ms. Ochoa's charge. JA 114–22, 340–47. Unable to resolve their dispute, the EEOC issued subpoenas seeking the requested information. JA 92–106, 169–82. The EEOC denied McLane's

petition to revoke the subpoenas on March 21, 2012. JA 183–97.

2. The EEOC then filed an action with the district court seeking enforcement of the subpoena based on Ms. Ochoa's charge. JA 1, 8–11.[2] Following briefing and a motion hearing, the district court denied enforcement of the subpoena in part. Pet. App. 18–33.

The district court determined that Ms. Ochoa's charge granted the EEOC jurisdiction to investigate her Title VII allegations, but not any claim under the ADA. Pet. App. 25–26. The district court therefore denied enforcement of the subpoena to the extent it required production of disability-related information. *Id.* at 26–27.

The district court rejected the EEOC's request for pedigree information that would identify individual employees because the information was not "relevant at this stage to a determination of whether the IPCS PCE systematically discriminates on the basis of gender." *Id.* at 28–29. "The addition of the gender variable" to McLane's testing data "will enable the E.E.O.C. to determine whether the IPCS PCE systematically discriminates on the basis of gender." *Id.* at 29. If statistical analysis indicates "that it does" discriminate, the district court wrote, "[a]t that point, pedigree information may become relevant to an investigation and the E.E.O.C. may find it necessary to seek such information." *Id.* at 30.

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[2] The district court had previously denied enforcement of the ADEA subpoena. Pet. App. 5.

Thus, the district court compelled McLane to produce nationwide information for employees and applicants of McLane's grocery division, including their sex, test date and score, position or reason test was taken, required score for that position, and any adverse employment action within 90 days of the test result. *Id.* at 31. The district court deemed the remaining requested information irrelevant to the EEOC's gender discrimination investigation. *Id.*

3. On appeal, the Ninth Circuit reviewed the district court decision *de novo*, and reversed in part and vacated in part the order. Pet. App. 15–16.

The Ninth Circuit held that the pedigree information was relevant to Ms. Ochoa's charge. Pet. App. 9–10. Under *Shell Oil*, the EEOC's desire to speak with individual "employees and applicants for employment who have taken the test to learn more about their experiences ... might cast light on the allegations against McLane—whether positively or negatively." *Id.* at 10. As one example, the Ninth Circuit noted that conversations with individual employees could allow the EEOC to determine whether "other female employees have been subjected to adverse employment actions after failing the test when similarly situated male employees have not." *Id.* The court determined that allowing the EEOC to access the information improves the Commission's ability to assess "whether use of the test has resulted in a 'pattern or practice' of disparate treatment." *Id.*

The Ninth Circuit rejected McLane's counter-arguments. Pet. App. 10–13. First, the court held that Ms. Ochoa need not have alleged explicitly a pattern-or-practice disparate treatment claim in

order for the EEOC to request pedigree information. *Id.* at 10–11. Second, the EEOC was not obliged to show that the pedigree information was "necessary" to its investigation. *Id.* at 11–12. Finally, the Ninth Circuit rejected McLane's argument that pedigree information was irrelevant to a neutrally applied strength test. *Id.* at 13. "The very purpose of the EEOC's investigation is to determine *whether* the test is being neutrally applied; the EEOC does not have to take McLane's word for it on that score." *Id.* The Ninth Circuit remanded the case for the district court to determine the unresolved question of whether producing the requested information would unduly burden McLane. *Id.* at 15–16.

SUMMARY OF ARGUMENT

An enforcement action in district court presents the question of a party's duty to comply with an administrative subpoena, which this Court has deemed a question of law. That inquiry typically consists of two parts: whether the investigation and request for documents is within the agency's statutory power, and whether the subpoena comports with the Fourth Amendment requirement of reasonableness.

When a court determines that an agency has (or has not) abided by statutory limits on its investigatory authority, and requested production of documents relevant to that investigation, it answers a legal question, and that answer is properly reviewed *de novo*.

So, too, is the determination whether the subpoena is reasonable under the Fourth

Amendment. By compelling self-disclosure, a subpoena is a constructive search within the Fourth Amendment guarantee. This Court has declared that the Fourth Amendment reasonableness standard requires that a subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. The parties treat this as the governing standard, but fail to acknowledge its source in the Fourth Amendment.

This Court has long held that appellate courts review *de novo* the mixed question of law and fact of whether a Fourth Amendment search or seizure is reasonable because of the existence of reasonable suspicion or probable cause. The standard of review should be the same for the reasonableness of constructive searches by subpoena. Indeed, that latter question is much less fact-intensive than issues of reasonable suspicion or probable cause. The definiteness of the subpoena (like the particularity of a warrant) involves strictly the legal question of construction of the subpoena. While burden on the employer is a question of fact, whether that burden is unreasonable when measured against the public interest in investigating unlawful conduct is a conclusion of law that an appellate court is as well positioned as the district court to make. Even in more fact-intensive contexts, this Court has adopted *de novo* review of mixed questions of constitutional law and fact to unify precedent and ensure uniformity. Those same considerations apply here.

This Court has on multiple occasions conducted independent review of the enforceability of an administrative subpoena. It has never once

recognized discretion in the district court's application of legal standards or deferred to the district court's determination.

The APA, codifying the law that existed as of 1946, answers the question presented definitively. It provides that a district court "shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law." 5 U.S.C. § 555(d). That mandatory requirement forecloses district court discretion, and thus forbids abuse-of-discretion review of district court decisions. Appellate courts uniformly review *de novo* district court determinations whether agency action is "in accordance with law," since that question is, by definition, legal. The APA applies to the NLRA and Title VII (which incorporates the former), and requires *de novo* appellate review here.

Nothing in Title VII departs from the APA's approach. Title VII vests discretion in the EEOC; it confers no discretion upon the district court that could justify abuse-of-discretion review on appeal. Congress has simply defined legal limits on the EEOC's investigatory authority that the courts must enforce. Congress required that an EEOC subpoena (1) "relate[] to unlawful employment practices covered by" Title VII and (2) be "relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a). To answer the first question, a district court must consider the elements of a valid charge and the range of conduct Title VII proscribes. It must then construe the text of the charge (without regard to extrinsic evidence) to ensure that it validly alleges conduct that Title VII outlaws. The second determination of relevance requires the district court to construe the

subpoena and the charge (both questions of law) and apply the legal standard of relevance (*i.e.*, whether the evidence "might cast light on the allegations against the employer," *Shell Oil Co.*, 466 U.S. at 68–69). It makes that determination based on the parties' theories as to the predicted value of the requested evidence to the EEOC's investigation. Determining relevance will rarely, if ever, require historical factfinding by the district court; the inquiry is legal in nature. Thus, the judicial task is to police the limits of the EEOC's investigatory power, informed by statutorily imposed standards. A district court's order marking out the boundaries of that power should be reviewed *de novo* in the court of appeals.

The parties advocate an abuse-of-discretion standard, but that standard is not only legally untenable for the reasons given, but unavailable in the absence of any statutory grant of discretion to the district court. The parties point to no case in which this Court has adopted an abuse-of-discretion standard to review determinations whether an agency has complied with statutory or constitutional limits or whether a party has a duty to comply with an agency order. This Court has embraced the abuse-of-discretion standard for review of certain subsidiary rulings that concern a district court's supervision of litigation, involve fact-intensive determinations where legal principles are secondary (especially ones that turn on witness credibility and demeanor), or invoke a district court's equitable or inherent powers. None of these circumstances exists here.

The parties rely on *United States v. Nixon*, 418 U.S. 683 (1974), but that is exactly such a case: it

involves a district court's issuance of its own pretrial criminal subpoenas, based on specific trial-related factual determinations, for the purpose of expediting criminal trials. Such subpoenas (which cannot be used for discovery) bear no resemblance to an investigatory EEOC subpoena, and the *Nixon* standards do not apply to administrative subpoenas issued by agencies of an independent branch of government pursuant to their independent statutory authority. Indeed, this Court has held that *Nixon* does not apply even to grand jury subpoenas, the validity of which turns on a legal standard of relevance to investigations that admits of no district court discretion.

The parties' remaining arguments lack force. Congress did not ratify the holdings of certain circuit decisions employing abuse-of-discretion review to NLRB subpoena enforcement orders when it incorporated section 11 of the NLRA into Title VII in 1972. *See* 42 U.S.C. § 2000e-9; 29 U.S.C. § 161. Section 11 does not address appellate review; there can be no ratification inconsistent with the APA; and there was no uniform judicial interpretation at the time. Nor will a *de novo* standard encourage marginal appeals that delay EEOC investigations. First, an appeal itself cannot delay an investigation (only a stay of the enforcement order can). Second, there is neither evidence nor logic behind this argument. The EEOC seldom brings subpoena enforcement actions, and few parties will forego a viable appeal if review is for abuse-of-discretion, especially since legal errors constitute *per se* abuses of discretion. *De novo* review not only prevents the injustice of inconsistent adjudications, but it also

promotes uniformity in the law on recurring issues, leading to fewer subpoena disputes and appeals as trial court decisions become more predictable and consistent with one another. The Ninth Circuit properly reviewed the district court's order *de novo*.

ARGUMENT

I. Appellate Courts Properly Review *De Novo* District Court Decisions To Enforce or Quash an Agency Subpoena.

A. This Court Has Long Recognized That Whether a Party Has a Duty To Comply with an Agency Subpoena Is a Legal Question.

From the dawn of the modern administrative state, Congress has empowered agencies and executive departments to issue subpoenas to access private information to perform their functions, and to seek enforcement in the district court.

In *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894), this Court considered a constitutional challenge to the provisions of the Interstate Commerce Act of 1887 authorizing judicial enforcement of the Interstate Commerce Commission's subpoenas. This Court rejected the claim that enforcement constituted an exercise of administrative and not judicial power, in violation of Article III. *Id.* at 469. The Court declared it "clear and indisputable" that the subpoenaed party had a "duty" (absent personal privilege) to obey the Commission's subpoena, "if the testimony sought, and the books, papers, etc., called for, relate to the matter under investigation, [and] if such matter is one which

the commission is legally entitled to investigate." *Id.* at 476. The issues to be decided, under the grant of jurisdiction to enforce the administrative subpoena, were simply "[w]hether the commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or to produce books, papers, etc., in his possession, is or is not in violation of his duty or in derogation of the rights of the United States," and such matters were within the judicial power to decide. *Id.*

This Court noted that, in contesting this duty in court, the subpoenaed party would be free

> to contend before that court that he was protected by the constitution from making answer to the questions propounded to him, or that he was not *legally bound* to produce the books, papers, etc., ordered to be produced, or that neither the questions propounded nor the books, papers, etc., called for relate to the particular matter under investigation, nor to any matter which the commission is entitled under the constitution or laws to investigate.

Id. at 479 (emphasis added). The Court rejected the claim that defendants were entitled to a jury trial on these legal questions: "the issue whether the defendants are under a duty to answer the questions propounded to them, and to produce the books, papers, documents, etc., called for, is manifestly not one for the determination of a jury. *The issue presented is not one of fact, but of law exclusively.*" *Id.* at 488 (emphasis added). "If there is any *legal reason*

why appellees should not be required to answer the questions put to them, or to produce the books, papers, etc., demanded of them, their rights can be recognized and enforced by the court below when it enters upon the consideration of the merits of the questions presented by the petition." *Id.* at 489 (emphasis added).[3]

This Court confirmed the legal nature of the inquiry in *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943). The Court held that the district court improperly denied enforcement of the Secretary of Labor's subpoena by deciding an issue (statutory coverage) that would be decided in subsequent agency adjudication. *Id.* at 507–09. This Court resolved the legal question of the enforceability of the subpoena

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[3] This Court has disclaimed the separate declaration in *Brimson*, 154 U.S. at 489, that there is no right of jury trial for criminal contempt of a court order. *See United States v. Gaudin*, 515 U.S. 506, 520 (1995). In *Gaudin*, this Court also overruled *Sinclair v. United States*, 279 U.S. 263 (1929), insofar as it held (relying upon *Brimson*) that a defendant had no right to a jury trial in a prosecution for criminal contempt of Congress to refuse to answer a "question pertinent to [a] question under [congressional] inquiry," Rev. Stat. § 102, 2 U.S.C. § 192. This Court disapproved *Sinclair*'s assumption that pertinence to a congressional inquiry was "a pure question of law," deeming it instead "a mixed question of law and fact." *Gaudin*, 515 U.S. at 520–21. As such, the Sixth Amendment required its submission to the jury. *Id.* at 521. In so ruling, this Court accepted *Sinclair*'s determination that relevancy "'is uniformly held [to be] a question of law'" for the court in civil trial matters, but observed that such a rule "says nothing about how relevancy should be treated when (like 'pertinence' or 'materiality') it is made an element of a criminal offense." *Id.* (quoting *Sinclair*, 279 U.S. at 298). Thus, *Brimson*'s holding that a party's duty to comply with an agency subpoena is a legal question in a civil enforcement proceeding remains in force.

itself: "The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act, and it was the *duty of the District Court* to order its production for the Secretary's consideration." *Id.* at 509 (emphasis added).

This Court has elsewhere described the question of whether compulsory process in aid of administrative investigation exceeds the agency's power as a "jurisdictional question ... cognizable in the courts." *United States v. Bisceglia*, 420 U.S. 141, 151 (1975) (IRS summons) (internal quotation marks omitted). The duty of a party to comply with a subpoena, including the determination whether the requested documents relate to a matter within an agency's investigatory authority, is a legal question properly reviewed *de novo*.

B. Appellate Courts Review *De Novo* a District Court's Application of the Fourth Amendment Standard for Enforcing Agency Subpoenas.

As this Court held in *Brimson*, in addition to questions of statutory duty, a subpoenaed party may raise constitutional defenses in court. 154 U.S. at 479. A subpoena is deemed a constructive search that must meet the Fourth Amendment's reasonableness requirement. This Court has declared the following "constitutional requirements for administrative subpoenas":

> "It is now settled that, when an administrative agency subpoenas cor-

> porate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."

Donovan v. Lone Steer, Inc., 464 U.S. 408, 415 (1984) (quoting *See v. City of Seattle*, 387 U.S. 541, 544 (1967)); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 651–53 (1950); *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186 (1946). Both parties accept this test as the governing standard, but do not address its constitutional derivation. Pet. Br. 18; Resp. Br. 4–5 & n.1. Like any other determination of the reasonableness of a search or seizure, the determination of whether an administrative subpoena violates the Fourth Amendment is a mixed question of law and fact that appellate courts properly review *de novo*.

1. A Subpoena Is a Constructive Search Under the Fourth Amendment.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, *papers, and effects*, against unreasonable searches and seizures." U.S. Const. amend. IV (emphasis added). A subpoena "is the equivalent of a search and seizure ... within the meaning of the 4th Amendment." *Hale v. Henkel*, 201 U.S. 43, 71 (1906) (grand jury subpoena); *Boyd v. United States*, 116 U.S. 616, 635 (1886). "[T]he right of personal security" guaranteed by the Constitution embraces "not merely protection of his person from assault, but exemption of his private affairs, books, and papers

from the inspection and scrutiny of others." *Brimson*, 154 U.S. at 479.

To be sure, a subpoena is not an actual search and seizure, but "a 'constructive' search." *City of Seattle*, 387 U.S. at 545; *Okla. Press*, 327 U.S. at 202, 207. A subpoena does not entail the intrusion of actual searches and seizures, and thus requirements imposed upon the latter—such as warrants or probable cause—do not apply. *Lone Steer*, 464 U.S. at 414–15; *Okla. Press*, 327 U.S. at 202–09. Nonetheless, the Fourth Amendment's protection "must necessarily attend all investigations conducted under the authority of congress." *Brimson*, 154 U.S. at 478; *see also Morton Salt*, 338 U.S. at 651–52 ("[T]he right to be let alone—the most comprehensive of rights and the right most valued by civilized men, is not confined literally to searches and seizures as such, but extends as well to the orderly taking under compulsion of process." (internal quotation marks and citations omitted)). "'The gist of the [Fourth Amendment] protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.'" *Id.* at 652–53 (quoting *Okla. Press*, 327 U.S. at 208).

2. The Fourth Amendment Requires Agency Subpoenas To Be "Reasonable."

The Court applied the Fourth Amendment restrictively in its early forays into the review of administrative subpoenas, construing agency authority narrowly. *See FTC v. Am. Tobacco Co.*, 264 U.S. 298, 305–06 (1924); *Harriman v. Interstate Commerce Comm'n*, 211 U.S. 407, 420–22 (1911);

Jones v. SEC, 298 U.S. 1, 28 (1936); Kenneth Culp Davis, *The Administrative Power of Investigation*, 56 YALE L.J. 1111, 1114, 1119 (1947) (discussing early evolution of the doctrine).

In *Oklahoma Press*, a 1946 case involving Department of Labor subpoenas under the Fair Labor Standards Act, this Court clarified the proper constitutional inquiry. The Court noted that Congress has "a wide investigative power" over private corporations, "analogous to the visitorial power of the incorporating state, when their activities take place within or affect interstate commerce." 327 U.S. at 204 (footnote omitted). The Court observed that a more liberal standard applied under the Fourth Amendment to subpoenas seeking compulsory production of corporate documents as opposed to an individual's private papers, *id.* at 205–06 & n.38 (citing *Wilson v. United States*, 221 U.S. 361 (1911), and *Essgee Co. of China v. United States*, 262 U.S. 151 (1923)); the former were valid so long as the subpoena did not "call[] for documents so broadly or indefinitely" as to resemble "a general warrant or writ of assistance, odious in both English and American history," *id.* at 207.

Distilling its prior precedents, this Court held that the Fourth Amendment "at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." *Id.* at 208. The Fourth Amendment requirement of probable cause, in this context, meant not probable cause to believe that a violation of law had occurred, but rather that "the

investigation is authorized by Congress, ... [and] is for a purpose Congress can order, and the documents sought are relevant to the inquiry." *Id.* at 209. Beyond this showing of statutory authority, the "requirement of reasonableness" includes "particularity," which in the subpoena context "comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry." *Id.*

For constructive searches of an administrative subpoena, the Fourth Amendment test reflects "the basic compromise ... to secure the public interest and at the same time to guard the private ones affected against the only abuses from which protection rightfully may be claimed," *i.e.*, freedom from "officious intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law." *Id.* at 213. The Administrator "shall not act arbitrarily or in excess of his statutory authority," and if the subpoena is, in any respect, "unreasonable or overreaches the authority Congress has given," the subpoenaed party could raise the "appropriate defence" in district court. *Id.* at 216–17.

Four years later, this Court reaffirmed and summarized the Fourth Amendment standard in *Morton Salt*. In that case, salt producers challenged on Fourth Amendment grounds a Federal Trade Commission order requiring them to produce reports of compliance with a court decree enforcing a Commission order to cease and desist from certain unfair trade practices. 338 U.S. at 636-37. Noting that the Fourth Amendment applies "to the orderly taking under compulsion of process," this Court reiterated that corporations engaging in interstate

commerce as "artificial entities" "can claim no equality with individuals in the enjoyment of a right to privacy." *Id.* at 652. The Court acknowledged that "a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry *as to exceed the investigatory power*," *id.* (internal citation omitted and emphasis added), but under the Fourth Amendment reasonableness test "it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *Id.* at 652–53 (citing *Okla. Press*, 327 U.S. at 208).

This Court has repeatedly characterized the *Morton Salt/Oklahoma Press* standard of reasonableness under the Fourth Amendment as "'settled'" law "describ[ing] the constitutional requirements for administrative subpoenas." *Lone Steer*, 464 U.S. at 414–15 (quoting *City of Seattle*, 387 U.S. at 544); *accord Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 67 (1974). Because the Fourth Amendment "must necessarily attend all investigations conducted under the authority of congress," *Brimson*, 154 U.S. at 478, the *Morton Salt/Oklahoma Press* standard applies to EEOC subpoenas. *See Shell Oil*, 466 U.S. at 72 n.26 (holding that, in addition to ensuring statutory compliance, "[t]he district court has responsibility ... more generally to assess any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose") (citing *Morton Salt*, 338 U.S. at 652–53, and *United States v. Powell*, 379 U.S. 48, 57–58 (1964)).

3. Appellate Courts Review Fourth Amendment "Reasonableness" Determinations *De Novo*.

In arguing for abuse-of-discretion or clear-error review, the parties and their *amici* treat the *Morton Salt/Oklahoma Press* standard as having materialized from thin air, and regard the choice of an appellate standard of review as a purely functional analysis without regard to the substantive source of law. But this Court's standard implements the Fourth Amendment's reasonableness requirement, and this Court has already held that the determinations of the reasonableness of searches and seizures under the Fourth Amendment are reviewed *de novo*. *Ornelas v. United States*, 517 U.S. 690 (1996). The same standard logically applies to the reasonableness of constructive searches by subpoena.

In *Ornelas*, this Court considered the proper standard of review of a district court's determination of two types of reasonable search and seizures under the Fourth Amendment: an investigatory stop supported by reasonable suspicion, *Terry v. Ohio*, 392 U.S. 1 (1968), and a warrantless search of a car based on probable cause, *California v. Acevedo*, 500 U.S. 565 (1991). 517 U.S. at 693. The Court described the district court's determination as a two-part inquiry comprised of (1) "the events which occurred leading up to the stop or search," and (2) "whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause." *Id.* at 696.

The Court held that the first inquiry involved "findings of historical fact," and should be reviewed "only for clear error." *Id.* at 699. The second inquiry, on the other hand, was a "mixed question of law and fact"—"whether the rule of law as applied to the established facts is or is not violated." *Id.* at 696–97. (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)).

The Court held that "the ultimate questions of reasonable suspicion and probable cause to make a warrantless search should be reviewed *de novo*." *Id.* at 691. The Court identified three factors supporting this conclusion.

First, it reasoned that *de novo* review safeguarded constitutional rights. "A policy of sweeping deference would permit, in the absence of any significant difference in the facts, the Fourth Amendment's incidence to turn on whether different trial judges draw general conclusions that the facts are sufficient or insufficient" to constitute a reasonable search of seizure. *Id.* at 697 (internal quotation marks and brackets omitted). "Such varied results would be inconsistent with the idea of a unitary system of law." *Id.* The Court noted that it had *never* applied any other standard in this Fourth Amendment context. *Id.*

Second, it noted that "the legal rules for probable cause and reasonable suspicion acquire content only through application." *Id.*; *accord Miller v. Fenton*, 474 U.S. 104, 114 (1985). Independent appellate review is necessary "if appellate courts are to maintain control of, and to clarify, ... legal principles." *Ornelas*, 517 U.S. at 697.

Finally, the Court observed that "*de novo* review tends to unify precedent." *Id.* It reasoned that independent appellate review of Fourth Amendment reasonableness determinations would help establish clear rules to guide not only district courts but also officers conducting the search. *Id.* at 697–98. Following *Ornelas*, courts apply the *de novo* standard generally to determinations of the constitutional reasonableness of searches and seizures.[4]

Ornelas governs this case. It is the same law at issue: the Fourth Amendment's prohibition "against unreasonable searches and seizures," which protects one's "papers" and "effects" as well as one's "person." U.S. Const. amend. IV. No justification exists for applying a different standard to constructive versus actual searches. Indeed, *de novo* review is the norm for the application of constitutional standards to the facts of a given case. *See United States v. Bajakajian*, 524 U.S. 321, 336 n.10 (1998) (noting that while a district court's factual findings "must be accepted unless clearly erroneous," a determination of a fine's excessiveness is reviewed *de novo* because it "calls for the application of a constitutional standard to the facts of a particular case").[5] Affording discretion to

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[4] *See, e.g.*, *United States v. Jennings*, 544 F.3d 815, 818 (7th Cir. 2008) ("[A] determination that a seizure was reasonable is reviewed *de novo*."); *United States v. Mallory*, 765 F.3d 373, 383 (3d Cir. 2014) (noting that circuits universally review determinations of exigent circumstances *de novo*); *United States v. Smith*, 389 F.3d 944, 950 (9th Cir. 2004) (reviewing permissibility of search incident to arrest *de novo*).

[5] *See, e.g.*, *Fenton*, 474 U.S. at 110 (voluntariness of confession under the Due Process Clause); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (independent review of actual malice required by First Amendment for defamation

district judges means that different results can be reached on the same facts, thus rendering a person's Fourth Amendment rights dependent on the luck of the draw of a trial judge. This Court has deemed the prospect of widely variant constitutional results "unacceptable." *Ornelas*, 517 U.S. at 697; *Cooper Indus.*, 532 U.S. at 440.

The considerations that prompted this Court to adopt a *de novo* standard in *Ornelas* apply *a fortiori* here. The determinations of reasonable suspicion and probable cause at issue in *Ornelas* are "fact-intensive" and typically require extensive evidentiary hearings; "[t]he factual details bearing upon those determinations are often numerous and (even when supported by uncontroverted police testimony) subject to credibility determinations." *Ornelas*, 517 U.S. at 701 (Scalia, J., dissenting). By contrast, in a subpoena enforcement proceeding, the subpoenaed evidence is not typically before the court, credibility determinations rarely come into play, and factfinding is minimal. This case is illustrative; here the district court resolved no disputed issues of fact that even

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liability); *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 431 (2001) (constitutionality of punitive damages awards); *Thompson v. Keohane*, 516 U.S. 99, 102 (1995) (determinations that a suspect is "in custody" and entitled under the Fifth Amendment to Miranda warnings); *Sumner v. Mata*, 455 U.S. 591, 597 (1982) (constitutionality of pretrial identification procedures); *Brewer v. Williams*, 430 U.S. 387, 397 n.4 (1977) (waiver of Sixth Amendment right to assistance of counsel). Only a narrow set of constitutional issues involving mixed questions of law and fact where "resolution depends heavily on the trial court's appraisal of witness credibility and demeanor," such as a criminal defendant's competency or a juror's bias, are treated as essentially factual and reviewed deferentially. *Keohane*, 516 U.S. at 111 (discussing cases).

required an evidentiary hearing. The case was decided after a motion hearing, JA 494–526, on briefing supported by a handful of declarations that simply recounted the negotiations between McLane and the EEOC and the data produced to date, JA 34–40, 228–231, McLane's corporate structure, JA 446–47, and the nature and availability of the contested information and the burden of producing it, JA 233–35, 448–62.

Moreover, the *Morton Salt/Oklahoma Press* standard requires predominantly legal determinations. That standard permits subpoena enforcement "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant," *Morton Salt*, 336 U.S. at 652–53, and "compliance will not be unreasonably burdensome," *City of Seattle*, 387 U.S. at 544. The questions of statutory authority and relevance to an authorized investigation are legal, both generally and in Title VII. *See supra* at 13–16; *infra* at 36–42.

Moreover, the definiteness requirement parallels the particularity requirement of a warrant, so that the party knows what items he is obligated to produce. *Okla. Press*, 327 U.S. at 209. This inquiry requires evaluation of a specific document's language, *see* Resp. Br. 28–29, but that does not give district courts "an institutional advantage" over appellate courts, *Koon v. United States*, 518 U.S. 81, 98 (1996), in interpreting a document's meaning and legal sufficiency. A determination that a warrant is indefinite likewise requires a document-specific evaluation, and that determination is reviewed *de novo*. *See, e.g., United States v. Reeves*, 210 F.3d

1041, 1046 (9th Cir. 2000); *United States v. Campbell*, 764 F.3d 880, 887 (8th Cir. 2014).

Finally, whether a subpoena is "*unreasonably* burdensome" under the Fourth Amendment, *City of Seattle*, 387 U.S. at 544 (emphasis added), is a policy-based legal determination. To be sure, there may be subsidiary factual questions of burden to the employer, such as the cost of gathering documents or extracting them from computer systems, the financial strain on the employer, and the interference with the employer's operations. Pet. Br. 36. Although such facts are often uncontested, the district court's findings of such purely factual questions are reviewable for clear error. *See Ornelas*, 517 U.S. at 699. But a determination of unreasonable burden requires measuring the public interest in law enforcement against the private interest in security of property. *Okla. Press*, 327 U.S. at 209; *see id.* at 217 ("There is no harassment when the subpoena is issued and enforced according to law."). The Fourth Amendment's "flexible" standard of reasonableness "takes into account the public need for effective enforcement of the particular regulation involved." *City of Seattle*, 387 U.S. at 545. A court may consider whether the cost to (or other burden upon) the employer is disproportionate to any investigatory value to the agency of the requested documents, for an agency may only subpoena documents that are "adequate, but not excessive, for the purposes of the relevant inquiry." *Okla. Press*, 327 U.S. at 209. But this policy-based constitutional determination of excessiveness, which may restrict the power of a coordinate branch or independent agency, is a legal conclusion that is equally the province of appellate

courts. *See Cooper Indus.*, 532 U.S. at 436 (proportionality and excessiveness of punitive damages and fines reviewed *de novo*). *Cf. Am. Target Advert., Inc. v. Giani*, 199 F.3d 1249, 1254 (10th Cir. 2000) (reviewing question of "undue burden upon interstate commerce" *de novo*); *Planned Parenthood of Greater Iowa, Inc. v. Miller*, 195 F.3d 386, 388 (8th Cir. 1999) (reviewing question of undue burden on privacy rights of statute banning partial birth abortions *de novo*).[6]

Because legal questions predominate, factual disputes are distinctly secondary to the application of

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[6] In cases involving IRS summonses, this Court has adopted a standard similar to *Morton Salt* as a test of the IRS's "good faith," *United States v. Clarke*, 134 S. Ct. 2361, 2365 (2014), which includes inquiry into whether "the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *Powell*, 379 U.S. at 58. Citing *Powell*, this Court has noted that the EEOC may not issue and enforce a subpoena for "an improper purpose." *Shell Oil*, 466 U.S. at 72 n.26. Whether the agency's purpose is improper appears to be part of the Fourth Amendment inquiry, *see Okla. Press*, 327 U.S. at 209, 213, but even if it arises independently from another source of law, this predominantly legal determination should be reviewed *de novo*. This Court held that "what counts as an illicit motive" is a "legal issue[]" not within the district court's discretion. *Clarke*, 134 S. Ct. at 2369. Thus, the ultimate conclusion that an agency pursued a subpoena for an improper purpose is a mixed question of law and fact (while a procedural ruling on the right to examine government agents is reviewed for abuse-of-discretion, *id.* at 2368). *De novo* review of such ultimate conclusions is necessary to unify precedent about what agency motives in investigation are illicit, given that "a presumption of regularity attaches to the actions of Government agencies," *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001).

law to fact, and witness credibility and demeanor will almost never be determinative, "the appellate court will be in as good a position ... as the district court was in the first instance" in resolving the constitutionality of subpoena demands, and thus the appellate court owes no deference. *Koon*, 518 U.S. at 98; *see also Cooper Indus.*, 532 U.S. at 440 (holding that *de novo* review was appropriate because the appellate court was equally capable, if not better suited, to decide two of the three criteria at issue). Moreover, even if some factual variation is inevitable, *de novo* review is necessary to unify precedent, giving consistent guidance to administrative agencies on the limits posed by the Fourth Amendment, and ensuring consistent enforcement of constitutional rights. *Ornelas*, 517 U.S. at 697–98. This Court should adhere to *de novo* review of all determinations of Fourth Amendment reasonableness.

C. This Court Has Always Determined *De Novo* a Party's Duty To Comply with an Agency Subpoena.

The history of appellate practice is relevant in determining the proper standard of review. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *Ornelas*, 517 U.S. at 697. This Court has always conducted independent review of the enforceability of administrative subpoenas. It has never once held that a party's duty to comply with such subpoenas is a matter of district court discretion or deferred to any such discretionary determination.

In *Endicott Johnson*, the district court had not reached the question of the relevance and reasonableness of the subpoena because it had

improperly determined that the respondent was outside the statute's coverage. 317 U.S. at 509. This Court did not remand the case, but instead independently resolved on the admitted facts that the subpoena must be enforced because it "was not plainly incompetent or irrelevant to any lawful purpose of the Secretary," and was "clearly within the limits of Congressional authority." *Id.* at 509-10. The Court would not have done so if subpoena enforcement were a matter of district court discretion; the proper course would have been to remand the matter to allow the district court to exercise its discretion in the first instance. *See Hills v. Gautreaux*, 425 U.S. 284, 306 (1975).

In *Oklahoma Press*, this Court reviewed conflicting district court decisions on whether to enforce subpoenas issued by the Wage and Hour Administrator investigating newspaper publishers. After rejecting the requirement of probable cause on which the decisions below turned, 327 U.S. at 215–16, this Court determined independently (and without regard to the view of either district court) that "[a]ll the records sought were relevant to the authorized inquiry," *id.* at 210, that the constitutional reasonableness standard was met, *id.* at 210–11, and that "[n]o sufficient reason was set forth in the returns or the accompanying affidavits for not enforcing the subpoenas," *id.* at 218. The Court did the same in *Morton Salt*. Applying the *Oklahoma Press* standard to a Federal Trade Commission order independently and without deference, the Court held that "[n]othing on the face of the Commission's order transgressed these bounds." *Morton Salt*, 338 U.S. at 652–53. In review of a contempt judgment, the Court

likewise independently applied the *Oklahoma Press* standard to a subpoena from the House Committee on Un-American Activities. The Court resolved that the requested records were "reasonably 'relevant to the inquiry,'" and that the subpoena "describe[d] them 'with all of the particularity the nature of the inquiry ... would permit,'" and was "not more sweeping than those sustained against challenges of undue breadth in *Endicott Johnson* ... and *Oklahoma Press*." *McPhaul v. United States*, 364 U.S. 372, 381–83 (1960). This unbroken record of independent determination by this Court of the enforceability of administrative subpoenas or similar compulsory process, and principles of *stare decisis*, *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), militate strongly in favor of a *de novo* standard of review.

D. The Administrative Procedure Act Limits Judicial Enforcement of a Subpoena to Determining Whether It Is "In Accordance with Law."

In keeping with the precedent above, Congress has declared in the APA that judicial enforcement of an administrative subpoena shall be limited to determining whether the subpoena is "in accordance with law." 5 U.S.C. § 555(d). Courts of appeals review this legal determination *de novo*. *See Tenet HealthSystems HealthCorp. v. Thompson*, 254 F.3d 238, 244 (D.C. Cir. 2001) (applying 5 U.S.C. § 706).

Subsection 6(c) of the APA provides that "[p]rocess, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law." 5 U.S.C. § 555(c). Subsection 6(d) grants parties a

right to "[a]gency subpenas authorized by law" on request and upon making any required showing of relevance and reasonableness of the request. *Id.* § 555(d). The statute then imposes a mandatory duty upon the courts to enforce any lawful subpoena:

> On contest, the court *shall sustain* the subpena or similar process or demand *to the extent that it is found to be in accordance with law*. In a proceeding for enforcement, the court *shall issue* an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

Id. (emphasis added).

The district court has no discretion in enforcing an administrative subpoena. It "shall sustain the subpena ... to the extent" it is lawful, quashing or modifying a subpoena otherwise. *Id.* If the subpoena is lawful, the court "shall issue" an enforcement order compelling production of the evidence or data sought. *Id.* In other words, the district court has "an affirmative duty under the APA ... to determine the extent to which the subpoena is in accordance with law and to enforce the subpoena to that extent." *United States v. Sec. State Bank & Trust*, 473 F.2d 638, 642 (5th Cir. 1973); Lee Modjeska, ADMINISTRATIVE LAW PRACTICE AND PROCEDURE § 2.4 (2016).

The legislative history confirms the APA's textual restriction of judicial enforcement to determinations

of a subpoena's lawfulness. Congress enacted the APA after this Court's opinions in *Brimson*, *Endicott Johnson*, and *Oklahoma Press*, all of which treat judicial enforcement as involving determinations of a subpoena's legal validity. The Senate Report describes subsection 6(d) as:

> constitut[ing] a statutory limitation upon the issuance or enforcement of subpenas *in excess of agency authority or jurisdiction*. This does not mean, however, that courts should enter into a detailed examination of facts and issues which are committed to agency authority in the first instance, but should, instead, inquire generally into the legal and factual situation and *be satisfied that the agency could possibly find that it has jurisdiction*.

See Administrative Procedure Act: Legislative History 1944–46, S. Doc. No. 79-248 at 206 (1946) (hereinafter "APA Legislative History") (excerpting Sen. Rep. No. 79-752 (1945) (emphasis added)). The House Report contains the same language almost verbatim, and notes that "[i]n such contests, the court is required to determine all relevant questions of law." *Id.* at 265 (House Rep. No. 180).[7]

As Senator McCarran, the Chairman of the Senate Judiciary Committee and co-sponsor of the APA in the Senate, declared: "Where a party contests a

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[7] The House Report states that courts should be satisfied that the agency "could lawfully," as opposed to "could possibly," have jurisdiction. APA Legislative History, *supra*, at 265.

subpoena, the court is to inquire into the situation, and, so far as the subpoena is found in accordance with the law, the court is to issue an order requiring the production of the evidence under penalty." APA Legislative History, *supra*, at 319 (remarks of Sen. McCarran, Mar. 12, 1946). "All that this section requires is that the court determine whether the subpoena issued comes within the general power of the agency." *Id.* at 415 (Department of Justice memorandum on S.7, which as amended became the APA, *id.* at 1). "[I]n view of the existing law," Congress's deliberate use of the phrase 'in accordance with law'" was "intended to define with exactness the limits of inquiry in judicial enforcement proceedings." *Tobin v. Banks & Rumbaugh*, 201 F.2d 223, 224–26 (5th Cir. 1953).[8]

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[8] Indeed, the only debated question is whether the APA standard overruled this Court's decision in *Endicott Johnson* insofar as it barred inquiry into the agency's jurisdiction over the conduct of the subpoenaed party. *See Tobin*, 201 F.2d at 226; *see also* APA Legislative History, *supra*, at 363 (view of Rep. Walter, a House sponsor of the APA, that section 6(d) overruled *Endicott Johnson*); Davis, *supra*, at 1148–49 (discussing legislative history). Because Congress deliberately chose the phrase "in accordance with law" and rejected proposals explicitly expanding judicial inquiry into questions of agency jurisdiction, the Department of Justice and the Fifth Circuit have interpreted section 6(d) of the APA as merely codifying existing law. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 69 (1947) ("[T]he subsection leaves unchanged existing law as to the scope of judicial inquiry where enforcement of a subpena is sought.") (citing *Endicott Johnson* and *Okla. Press*)); *Tobin*, 201 F.2d at 224–26. But whether section 6(d) codified existing law or overruled *Endicott Johnson* to permit collateral review of the agency's jurisdiction over the party in a subpoena enforcement proceeding, judicial enforcement is still limited to determining

When a district court applies the APA's "in accordance with law" standard, appellate review is *de novo*. *See Tenet*, 254 F.3d at 243–44; *Preferred Risk Mut. Ins. v. United States*, 86 F.3d 789, 791–92 (8th Cir. 1996) (a district court's "finding that the actions of an agency were arbitrary, capricious, and not in accordance with law is reviewed *de novo*"); *accord Sierra Club v. Davies*, 955 F.2d 1188, 1192 (8th Cir. 1992); *Asarco, Inc. v. U.S. EPA*, 616 F.2d 1153, 1161 (9th Cir. 1980); *Biodiversity Conserv'n All. v. Jiron*, 762 F.3d 1036, 1059 (10th Cir. 2014).

In a typical subpoena enforcement action, the district court determines whether the subpoena is "in accordance with law" by determining whether the agency has complied with statutory requirements, and whether the subpoena satisfies the *Morton Salt/Oklahoma Press* Fourth Amendment standard of reasonableness. *See* 1 Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 4.2, at 286 (5th ed. 2010) ("A party who wants to resist enforcement of an agency subpoena has a realistic prospect of success only when it can raise a statutory or constitutional objection that is unique to the statute at issue or the nature of the materials requested."). Here, once the district court had determined that the EEOC's subpoena was not in accordance with law because it was not relevant to the charge under 42 U.S.C. § 2000e-8, the court of appeals was entitled to review that question *de novo*.

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whether the subpoena is in accordance with law, a legal question that an appellate court reviews *de novo*.

II. A District Court Decision Regarding the Scope of the EEOC's Statutory Authority to Issue a Subpoena Under Title VII Requires *De Novo* Review.

Nothing in Title VII imposes any standard of review different from the APA. The only unique aspect of Title VII is that Congress placed stricter legal limits upon the EEOC's authority than typically apply to parallel subpoena powers granted to other agencies. *Shell Oil*, 466 U.S. at 64 ("[T]he EEOC's investigative authority is tied to charges filed with the Commission ... unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction ... ."). Congress did so by requiring that the materials sought (1) "relate[] to unlawful employment practices covered by" Title VII and (2) be "relevant to the charge under investigation." 42 U.S.C. 2000e-8(a). Determining whether the Commission has confined itself to the subpoena authority granted by Congress is a legal task, and the court of appeals properly reviews that question *de novo*.

A. The Statutory Restrictions in Title VII Raise Questions of Law, Which Must Be Reviewed *De Novo*.

1. Whether Evidence "Relates to Unlawful Employment Practices" Is a Legal Question.

To determine whether the information subpoenaed by the EEOC "relates" to conduct made unlawful by Title VII, the district court must first determine that the EEOC had jurisdiction to investigate because a valid charge of unlawful

employment practices had been filed. To answer that legal question, the court must consider the elements of a valid charge and the range of conduct Title VII proscribes. The district court must then construe the text of the charge to ensure that it alleges conduct made unlawful by Title VII. The district court is entitled to no deference in deciding either what Title VII covers or what the text of the charge says; these tasks yield answers to a question of law.

"[T]he existence of a charge that meets the requirements set forth in § 706(b), 42 U.S.C. § 2000e-5(b), is a jurisdictional prerequisite to judicial enforcement of a subpoena issued by the EEOC." *Shell Oil*, 466 U.S. at 65. Section 706(b) requires that the charge "be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b). EEOC regulations provide that a valid charge must sufficiently describe unlawful employment practices by providing "[a] clear and concise statement of the facts, including pertinent dates," identifying "the parties," and describing "generally the action or practices complained of." 29 C.F.R. § 1601.12(b).

Determining whether there is a valid Title VII charge is quintessentially a legal task, and a district court's determination on such a question is unarguably reviewed *de novo*. The validity of a charge is "determined from the face of the charge, not from extrinsic evidence." *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 650 (7th Cir. 2002); *see also EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1065 (6th Cir. 1982). A charge will be deemed valid unless, on its face, it alleges no unlawful employment practice within the

scope of Title VII as a matter of law. *See, e.g., U.S. EEOC v. Maritime Autowash, Inc.*, 820 F.3d 662, 665 (4th Cir. 2016) (holding that because the EEOC charge at issue sufficiently alleged national origin discrimination on its face, its validity could not be defeated by employer's potential defenses); *cf. EEOC v. Cherokee Nation*, 871 F.2d 937, 938–39 (10th Cir. 1989) (reversing district court's enforcement of subpoena because the age discrimination charge did not state an ADEA claim against employer as a matter of law). The "interpretation of an EEOC charge presents a question of law that [appellate courts] review *de novo*, not a question of fact." *EEOC v. Konica Minolta Bus. Solutions U.S.A., Inc.*, 639 F.3d 366, 371 (7th Cir. 2011).[9]

The EEOC may only investigate unlawful employment practices proscribed in Title VII. 42 U.S.C. § 2000e-5(a). If the charge fails to describe any employment practice made unlawful by Title VII, the EEOC lacks authority to investigate, and the district court must refuse to enforce any subpoena issued in the matter. *See EEOC v. Michael Constr. Co.*, 706 F.2d 244, 248 (8th Cir. 1983) ("If the court finds that the charge ... is not sufficient under Title VII or EEOC regulations, it may deny judicial enforcement of the EEOC subpoena issued pursuant to that charge ... ."). If, however, the charge describes an unlawful employment practice, the EEOC has authority, and indeed, a statutory obligation, to investigate, and it may subpoena

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[9] *Accord Pacheco v. Mineta*, 448 F.3d 783, 788–89 (5th Cir. 2006); *Nichols v. Am. National Ins.*, 154 F.3d 875, 886 (8th Cir. 1998).

information relevant to the charged unlawful practices. *See Shell Oil*, 466 U.S. at 64.

In other words, answering the first statutory question—whether the charge is "valid" and alleges conduct unlawful under Title VII—requires the district court to do two things: (a) find the law of charge validity, and the conduct Title VII proscribes; and (b) construe the charge itself to determine whether it passes muster. Both inquiries are legal, and a district court's resolution of those questions is reviewed *de novo*.

2. Relevance of the Information to the Charge Presents a Legal Question.

Once the district court has determined, as a matter of law, that the charge is "valid," and alleges conduct made unlawful by Title VII, it still may only enforce the subpoena if the subpoenaed information would be "relevant to the charge," 42 U.S.C. § 2000e-8(a). That is a legal determination, too. *See Brimson*, 154 U.S. at 488 ("The issue presented is not one of fact, but of law exclusively."); *Florez v. CIA*, 829 F.3d 178, 184 (2d Cir. 2016) ("Relevance is a legal determination.") (internal quotation marks omitted); *Konica*, 639 F.3d at 368 (examining relevance in a subpoena enforcement context: "[A]s usual, we consider questions of law *de novo*. As both parties conceded at oral argument, this case presents a straightforward question of law." (internal citation omitted)); *NLRB v. Rogers Mfg. Co.*, 406 F.2d 1106, 1110 (6th Cir. 1969) ("Axiomatically, the determination of relevancy is a matter of law and not of fact.").

As the EEOC says, "relevance" is "'generously construed.'" Resp. Br. 5 (quoting *Shell Oil*, 466 U.S. at 68). The statute allows the EEOC to seek any evidence "that might cast light on the allegations against the employer." *Shell Oil*, 466 U.S. at 68–69.

It is fitting that the judicial standard established for marking out the boundaries of the Commission's investigatory authority provides that flexibility. Whether evidence would cast light on the allegations in a valid charge involves predictive judgment and experience, and Congress vested the responsibility to answer that question in the first instance in the EEOC, as it has expertise in such matters. *See* 42 U.S.C. § 2000e-9; 29 U.S.C. § 161(1); *see also EEOC v. Randstad*, 685 F.3d 433, 448 (4th Cir. 2012) ("Congress has delegated to the EEOC the authority to investigate charges of discrimination, and naturally the agency has developed expertise in that area. In this and other areas, where an agency is tasked with investigation, we 'defer to an agency's own appraisal of what is relevant so long as it is not obviously wrong.'" (internal citation omitted)).

But, as with relevance determinations generally, "the determination of whether the information sought bears a sufficient relationship to the investigative purposes to permit enforcement of the subpoena is predominantly a matter of law." *EEOC v. United Parcel Serv., Inc.*, 587 F.3d 136, 142 (2d Cir. 2009) ("*UPS*") (Newman, J., concurring). The congressionally established and judicially enforced boundaries placed on the EEOC's investigatory authority, as relaxed as they may be, are legal boundaries nonetheless. These legal limits, found in the text of Title VII, reflect "Congress' desire to

prevent the Commission from exercising unconstrained investigative authority," *Shell Oil*, 466 U.S. at 65, and it is the courts' responsibility to enforce those limits as a matter of law. Courts may not leave the fox to guard the henhouse, and the best way to avoid this "fox-in-the-henhouse syndrome" is "by taking seriously, and applying rigorously, in all cases, statutory limits on [the] agencies' authority." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013).[10] Doing so requires the courts to answer legal, not factual, questions.

The critical point is that any "discretion" in deciding what is relevant to the subpoena *belongs to the EEOC*, not to the district court. The EEOC adverts to the rule that a district court's admission or exclusion of evidence under the relevance standard of Federal Rule of Evidence 401 is reviewed for abuse of discretion, *see* Resp. Br. 23 & 28, but that is precisely because the admissibility of evidence in proceedings it supervises is committed to the district court's discretion. *See infra* at 48-49. The district court enjoys no such discretion with regard to EEOC subpoenas. No matter how much latitude the EEOC possesses under *Shell Oil*, a district court order that purports to approve or delimit EEOC's investigatory authority is entitled to no deference from the court of appeals. It is a legal determination. The EEOC,

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[10] Unlike in *Arlington*, this case presents no question of deference under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). The EEOC has not determined the reach of the statutory phrases "related" or "relevant," and possesses no statutory authority to do so in any event; Congress has only delegated the EEOC the authority to promulgate "procedural regulations to carry out the provisions of this [subchapter]" in conformity with the APA. 42 U.S.C. § 2000e-12(a).

given its record of prevailing in district courts, may prefer deferential review, but enforcement determinations are properly subject to *de novo* review.

B. The District Court Is Not Entitled to Deference Because Factual Questions Do Not Predominate in Enforcement Decisions.

The parties and their *amici* rely heavily on the variable subject matter of subpoenas as a rationale for abuse-of-discretion (or clear-error) review in the court of appeals. But simply because relevance may be "variable in relation to the nature, purposes and scope of the inquiry," *Okla. Press*, 327 U.S. at 209, does not mean that factual questions predominate, or that the district court is better positioned than the court of appeals to determine relevance.

To the contrary, the district court conducts an extremely limited factual review *precisely because* the Commission's own determinations regarding the relevance of the requested evidence in issuing the subpoena are given substantial weight. The district court, in deciding whether to enforce an EEOC subpoena, does not independently make discretionary predictive judgments about whether the evidence will cast light on the allegations against the employer, but merely decides whether the Commission has "act[ed] arbitrarily or in excess of [its] statutory authority." *Id.* at 216; *see Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997) ("[T]he district court should not reject the agency's position [on relevance] unless it is obviously wrong." (quotation marks omitted)). Thus, when "a district court fails to accord appropriate scope to an

agency's legitimate demands for information, an appellate court is entitled to rule that the district court has committed an error of law." *UPS*, 587 F.3d at 143 (Newman, J., concurring).

The district court is rarely called upon to make determinations of historical fact in deciding relevance, much less resolve factual disputes; the dispute is merely about the relationship that the *type* of evidence requested (here, pedigree information) bears to the charge being investigated. Thus, the district court's review is "sharply limited," and "summary in nature." *Randstad*, 685 F.3d at 442; *Konica*, 639 F.3d at 368. In the great run of cases, the district court simply has to determine the scope of the charge (which defines the agency's authority—a legal question determined form the face of the charge itself), and the scope and nature of the documents requested (determined from the face of the subpoena). *See, e.g.*, *Konica*, 639 F.3d at 368 (citing *EEOC v. Tempel Steel Co.*, 814 F.2d 482, 485 (7th Cir. 1987)). The district court then hears argument about the predicted value of the evidence to the EEOC's investigation of the charge, as it did here, JA 20–22, 211–15, and applies the *Shell Oil* standard of whether the evidence will cast light on the allegations. *Accord* Petr. Br. 16 (district court "consider[ed] the language of the charge against the EEOC's evolving theories of relevance"). Resolving these issues does not require historical factfinding by the district court.

The EEOC's assertion that the district court is better suited than the court of appeals to make these determinations is mistaken. Unlike a typical civil action on the court's docket, which the district judge

observes and manages from complaint through trial, a subpoena enforcement action comes to the district court as a discrete proceeding presenting the singular issue of the respondent's duty to comply with the agency's subpoena. "The documents involved are usually unknown except to the respondents, and the district court is frequently not familiar with the issues or the specific evidentiary necessities of the case." John B. Benton, *Administrative Subpoena Enforcement*, 41 TEX. L. REV. 874, 889 (1963). Because the investigation is conducted by, and the judgment exercised by, the EEOC, the district court exercises no real discretion to which the court of appeals is bound to defer. Rather, the district court makes a determination, usually on a fully composed and undisputed record, whether the Commission's subpoena lies within or outside of the broad range of authority accorded by the statute. That is a legal conclusion of the sort the court of appeals is perfectly situated to make.

In sum, the district court's inquiry into relevance does not encompass findings of historical fact, nor does such inquiry rely on the district court's supposedly superior knowledge of the parties or the underlying dispute.[11] Instead, the district court's decision is more akin to a determination under Federal Rule of Civil Procedure 12(b)(6), where the court assesses the potential probative or investigatory force of the requested evidence (or

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[11] Although Petitioner contends that this inquiry is "essentially factual in nature," Pet. Br. 25, citing *FTC v. Lonning*, 539 F.2d 202, 210 n.14 (D.C. Cir. 1976), the "fact" proposition "crept into the case law without much thought" or supporting authority. *UPS*, 587 F.3d at 141 (Newman, J., concurring).

evidence that may be generated thereby), and merely decides whether the it satisfies the legal standard. District courts are not better situated to make such decisions about statutory authority than are appellate courts. *See Fenton*, 474 U.S. at 114 (where the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law").

III. The Proposed Abuse-of-Discretion Standard Is Unsound.

Both parties and *amici* engage in a detailed functional analysis of why, in their view, an abuse-of-discretion standard may be more efficient. *See* Pet. Br. 21, 28–29; Resp. Br. 26–33. That standard is foreclosed for reasons already given, but, regardless, they misconceive the nature of the judicial inquiry, and a functional analysis favors *de novo* review.

A. District Courts Are Not Afforded Discretion in the Enforcement of EEOC Subpoenas.

The parties' proposed standard of review is premised on a fundamental error: an abuse-of-discretion standard applies only when Congress has vested the district court with discretion, or where the district court's discretion is inherent. Here, as noted above, the only discretion involved belongs to the EEOC, not to the district court. *See Mach Mining*, 135 S. Ct. at 1653 (noting, in analyzing judicial review of conciliation actions, the "expansive discretion that Title VII gives the EEOC," which

limits the court's function to "ensuring that [the EEOC] follows the law"); *Randstad*, 685 F.3d at 451 (recognizing that decision as to scope of subpoena is a matter of EEOC discretion); *see also Okla. Press*, 327 U.S. at 201 ("The very purpose of the subpoena and of the order, as of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, *in the Administrator's judgment*, the facts thus discovered should justify doing so." (emphasis added)).

Petitioner (Br. 20) relies on a Sixth Circuit decision concluding that because section 11 of the NLRA provides that a district court "shall have jurisdiction" to enforce a subpoena, 29 U.S.C. § 161(2), "enforcement of the subpoena is ... confided to the discretion of the District Court, which is to be judicially exercised." *Goodyear Tire & Rubber Co. v. NLRB*, 122 F.2d 450, 453 (6th Cir. 1941). The Sixth Circuit's proclamation is a non sequitur.

First, a district court can never act without jurisdiction. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."). Thus, under the Sixth Circuit's untenable reasoning, a statute granting the district court jurisdiction would *always* result in the district court's "discretion" and deferential appellate review. But a grant of jurisdiction simply declares the district court's power to decide the case, not how it is to decide the case or the standards it should employ. In any event, the

APA supersedes the *Goodyear* holding, and provides that a district court "shall sustain" a subpoena if it "is in accordance with law." 5 U.S.C. § 555(d). That provision applies to NLRB (and EEOC) subpoenas, *see, e.g., D.G. Bland Lumber Co. v. NLRB*, 177 F.2d 555, 558 (5th Cir. 1949), and forecloses any claim of district court discretion.[12]

Second, Title VII's governing statutory language does not provide the district court with discretion with regard to EEOC subpoenas. Rather, Section 2000e-8(a) expressly provides that the "Commission or its designated representative *shall at all reasonable times have access* to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against *that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.*" 42 U.S.C. § 2000e-8(a) (emphasis added). The statute further recognizes the Commission's discretion to decide upon the documents it needs in the Act's revocation provisions, which authorizes revocation of a subpoena "if in its opinion" the subpoena is unrelated to the investigation or lacks sufficient particularity. 29 U.S.C. § 161(1); 42 U.S.C. § 2000e-9. Nothing in Title VII confers any form of discretion upon the district court; the court simply determines the subpoena's legality.

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[12] For the same reason, the EEOC's suggestion that invocation of "the court's process," *Powell*, 379 U.S. at 58, is enough to create discretion in the district court, Resp. Br. 20, is unsound. Every civil action involves invocation of judicial process.

B. The Abuse-of-Discretion Standard Does Not Apply to Determinations of a Person's Statutory Duty to Comply with an Agency Subpoena.

The parties point to no case in which this Court has ever adopted an abuse-of-discretion standard for review of the ultimate determination whether an agency has complied with statutory or constitutional limits or whether a party has a duty to comply with an agency order. These are questions of law (including mixed questions of fact and law). *Brimson*, 154 U.S. at 488. By contrast, district courts are deemed to have discretion over certain subsidiary rulings that concern the supervision of its own litigation, involve fact-intensive determinations that turn on witness credibility and the evaluation of demeanor, or invoke a district court's equitable or inherent powers. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991); *Fenton*, 474 U.S. at 114; *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

Consistent with that conceptual understanding, the Court has endorsed an abuse-of-discretion standard for decisions involving matters of "case management, discovery, and trial practice,"[13]

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[13] *Clarke*, 134 S. Ct. at 2368 (decision to allow examination of IRS agents); *Crawford-El v. Britton*, 523 U.S. 574, 598–601 (1998) (reasoning that because Federal Rule of Civil Procedure 26 "vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery," and because the district court has "the most experience in managing cases," the district court is entitled to "broad discretion in the management of the factfinding process").

evidence,[14] procedure,[15] sanctions,[16] remedy,[17] sentencing,[18] and fees and costs.[19] Enforcement of an agency subpoena presents no such matter.

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[14] *See, e.g.*, *Old Chief v. United States*, 519 U.S. 172, 174 n.1 (1997) ("The standard of review applicable to the evidentiary rulings of a district court is abuse of discretion."); *GE v. Joiner*, 522 U.S. 136, 141–47 (1997) (decision to strike expert testimony).

[15] *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 238 (1997) (Fed. R. Civ. P. 60(b)(5) motion rulings); *Denton v. Hernandez*, 504 U.S. 25, 30–33 (1992) (dismissals of frivolous complaints); *Renico v. Lett*, 559 U.S. 766, 773 (2010) (declaration of mistrial); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288–89 (1995) (stay of declaratory judgment action); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257–61 (1981) (*forum non conveniens* ruling); *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 555 (2014) (remand order); *United States v. Taylor*, 487 U.S. 326, 335–36 (1988) (choice to dismiss an indictment with or without prejudice).

[16] *See, e.g.*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 404, 404–05 (1990) (holding that the imposition of Federal Rule of Civil Procedure 11 sanctions should be reviewed for abuse-of-discretion because this will "enhance these courts' ability to control the litigants before them," and because the district court is "best situated to determine when a sanction is warranted" in light of the local bar's litigation practices); *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982) (sanction under Fed. R. Civ. P. 37 for failing to comply with a discovery order).

[17] *See, e.g.*, *eBay*, 547 U.S. at 391 (permanent injunction); *Ashcroft v. ACLU*, 542 U.S. 656, 664–65 (2004) (preliminary injunction); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424–25 (1975) (backpay under Title VII); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1934 (2016) (enhancement of damages in a patent case).

[18] *See, e.g.*, *Koon*, 518 U.S. at 98.

[19] *See, e.g.*, *Pierce*, 487 U.S. at 555–59 (award of attorneys' fees under the Equal Access to Justice Act); *HighMark Inc. v.*

The principal case upon which the parties rely in support of an abuse-of-discretion standard, *Nixon*, 418 U.S. 683, is exactly the kind of case that involves traditional district court discretion—the issuance of its own judicial process based on considerations of trial management—and is inapposite.

At issue in *Nixon* was enforcement of a criminal pretrial subpoena *duces tecum*. 418 U.S. at 702. Such subpoenas serve "to expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials." *Id.* at 698–99. Under Federal Rule of Criminal Procedure 17(c),

> the moving party must show (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

Id. at 699–700 (footnote omitted). This Court held that "[e]nforcement of a pretrial subpoena duces tecum must necessarily be committed to the sound discretion of the trial court *since the necessity for the subpoena most often turns upon a determination of*

Allcare Health Mgmt. Sys., 134 S. Ct. 1744, 1748 (2014) (award of attorney's fees under 35 U.S.C. § 285).

factual issues," and thus would not be disturbed on appeal absent a showing that the trial court acted arbitrarily or without record support. *Id.* at 702 (emphasis added).

None of the considerations that supported abuse-of-discretion review in *Nixon* apply here. This case does not involve judicial subpoenas and a district court's discretionary control of its own compulsory process or the management of its trials, nor does the enforceability depend upon the "factual determinations" set forth in *Nixon*. An agency's subpoena power is "'not derived from the judicial function.'" *Powell*, 379 U.S. at 57 (quoting *Morton Salt*, 338 U.S. at 642–43). Unlike *Nixon*, which involved a collateral order within a criminal trial concerning the court's own process, an order enforcing an administrative subpoena is the final order resolving a separate, "self-contained" judicial proceeding between an administrative agency and the respondent. *Cobbledick v. United States*, 309 U.S. 323, 330 (1940). Thus, it would be illogical to extend *Nixon*'s holding to subpoenas issued by administrative agencies or executive departments, which are enforced in independent civil actions, and do not involve the exercise of a district court's discretionary judicial powers.

Furthermore, the subpoenas in *Nixon* and this case serve decidedly different functions. The EEOC's subpoena power is coextensive with its "'power of inquisition,'" *Powell*, 379 U.S. at 57 (quoting *Morton Salt*, 338 U.S. at 642), and serves an investigatory function. On the other hand, the subpoena at issue in *Nixon*, intended to expedite the trial, was definitively "not intended to provide a means of discovery." 418

U.S. at 698; *Bowman Dairy Co. v. United States*, 341 U.S. 214, 219 (1951) ("Rule 17(c) was not intended to provide an additional means of discovery."). These fundamental differences between pretrial criminal and administrative subpoenas make *Nixon*'s holding inapplicable here.

Indeed, *Nixon* does not even apply to all forms of judicial subpoenas: namely, grand jury subpoenas (to which administrative subpoenas have sometimes been compared, *Okla. Press*, 327 U.S. at 216–17). "A grand jury subpoena is ... much different from a subpoena issued in the context of a prospective criminal trial," and "many of the rules and restrictions that apply at a trial do not apply in grand jury proceedings." *United States v. R. Enters., Inc.*, 498 U.S. 292, 297–98 (1991). "Unlike [a] court, whose jurisdiction is predicated on a specific case or controversy, the grand jury 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'" *Id.* at 297 (quoting *Morton Salt*, 338 U.S. at 642–43). A grand jury maintains a "functional independence from the Judicial Branch," *United States v. Williams*, 504 U.S. 36, 48 (1992), and is "free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it." *United States v. Dionisio*, 410 U.S. 1, 17–18 (1973).

Accordingly, this Court held that "the *Nixon* standard does not apply in the context of grand jury proceedings." *R. Enters.*, 498 U.S. at 300. In place of the factual determinations of the *Nixon* test to which an appellate court must defer, this Court defined a test for grand jury subpoenas that is strictly legal in

nature and divorced from any considerations of trial management: "the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." *Id.* at 301. Although the courts of appeals reflexively apply the abuse-of-discretion standard to grand jury subpoenas, *see* Resp. Br. 24–25, the *R. Enterprises* test of relevance as a matter of law involves no discretionary district court determinations requiring deference from the appellate court. But if the abuse-of-discretion standard does apply to grand jury subpoenas—an issue the Court need not decide—it is only because the grand jury (although functionally independent) is "an appendage of the Court" without its own subpoena power, *Williams*, 504 U.S. at 66 (quoting *Brown v. United States*, 359 U.S. 41, 49 (1959)), and thus "a part of the judicial process," *Cobbledick*, 309 U.S. at 327. Administrative agencies are on opposite footing. The *Nixon* standard of review should not be applied to enforcement of administrative subpoenas issued by an *independent* branch of government pursuant to its *independent* statutory authority.

C. Congress Has Not Ratified the Abuse-of-Discretion Standard.

Invoking *Lorillard v. Pons*, 434 U.S. 575 (1978), the EEOC claims that Congress ratified the abuse-of-discretion standard when it incorporated the NLRA procedures into Title VII in 1972 because the Sixth Circuit in *Goodyear* and three other circuits had applied such a standard in NLRA subpoena cases. Resp. Br. 25–26.

That argument falters for a number of reasons. First, nothing in the NLRA (or Title VII) addresses appellate review, and thus there is nothing that could be ratified by incorporation of section 11 of the NLRA into Title VII. Second, the proper appellate standard of review for administrative subpoenas is not statute-specific, and indeed the *Oklahoma Press/Morton Salt* standard derives from the Fourth Amendment. Third, Congress adopted a rule of mandatory enforcement of administrative subpoenas that are "in accordance with law," 5 U.S.C. § 555(d), which is inconsistent with abuse-of-discretion review. The *Lorillard* ratification canon cannot be invoked to impliedly repeal the APA as to NLRB and EEOC subpoenas.

Finally, the *Lorillard* canon applies only "when judicial interpretations have settled the meaning of an existing statutory provision ...." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85, (2006) (internal quotation marks omitted). Even as to NLRA cases before 1972, there was no uniform rule; the Fifth Circuit, for example, applied the APA "in accordance with law" standard in NLRA cases, which is inconsistent with abuse-of-discretion review. *See D.G. Bland Lumber*, 177 F.2d at 558; *see also NLRB v. Anchor Rome Mills*, 197 F.2d 447, 448-49 (5th Cir. 1952). Moreover, Congress in 1972 was presumptively aware of *Brimson*, which unequivocally holds that the "duty to answer the questions propounded to them, and to produce the books, papers, documents, etc., called for" is a question of "law exclusively," 154 U.S. at 488, as well as the multiple decisions where this Court independently determined the enforcement of

administrative subpoenas. There can be no ratification when "there was no settled ... interpretation ... about which Congress could have been aware." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 531 (1994).

D. *De Novo* Review Does Not Encourage Marginal Appeals and Will Not Materially Delay EEOC Investigations.

The parties and *amici* assert that a deferential review standard would encourage fewer appeals and foster judicial efficiency. Pet. Br. 28–29; Resp. Br. 26–33; Equal Employment Advisory Council ("EEAC") Br. 15–26; Professors' Br. 11. But nothing substantiates that *de novo* review fosters frivolous appeals, or otherwise materially delays EEOC investigations. Congress authorized an appeal as of right, and complaints about having to litigate appeals simply quarrel with the statutory scheme.

To begin, judicial efficiency is not solely a matter of speed of adjudication. *De novo* review unifies precedent and clarifies legal principles. *Cooper Indus.*, 532 U.S. at 436. Unity in precedent on recurring issues will, in fact, streamline litigation, for there will be fewer subpoena disputes and appeals as trial court decisions become more predictable and consistent. More importantly, *de novo* review promotes justice. There should be uniformity in decisions as to whether the EEOC can seek access to other test takers through pedigree information in investigating charges of systemic discrimination in the administration of employment tests, and the factors that may justify denial of such access to the Commission. This and other relevance

determinations are not "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Pierce*, 487 U.S. at 562 (internal quotation marks omitted). It does not serve employers, employees, or the public interest for such decisions to vary with the inclinations of a particular district judge.

There is also no basis to the parties' suggestion that filing an appeal will delay an EEOC investigation. The EEOC's appeal of an order quashing a subpoena does not cause delay; the quashing order itself curtails the investigation. Nor does delay result from a respondent's appeal of an order enforcing the subpoena; the investigation continues apace except in the extraordinary circumstance where a stay is granted, which "is not a matter of right." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal citation omitted). Courts have frequently denied motions to stay enforcement of EEOC subpoenas to avoid undue delay. *See, e.g.*, *EEOC v. Aerotek, Inc.*, 815 F.3d 328, 331–32 (7th Cir. 2016); *EEOC v. Optical Cable Corp.*, No. CIV. A. 98-MC-02-R, 1998 WL 236930, at *3 (W.D. Va. May 1, 1998).[20]

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[20] For example, the EEOC successfully opposed a stay before the Seventh Circuit "to prevent any further delay in the Commission's investigation." Opp. to Mot. to Stay, *EEOC v. Aerotek, Inc.*, No 15-1690 (7th Cir. July 28, 2015); *see also id.*, Dkt. No. 23 (order denying stay); *see also, e.g.*, *EEOC v. A.E. Staley Mfg. Co.*, 711 F.2d 780, 783 (7th Cir. 1983); *EEOC v. Allstate Ins.*, No. 81-C-518, 1981 WL 261, at *2–3 (N.D. Ill. May 14, 1981); *EEOC v. Laidlaw Waste, Inc.*, 934 F. Supp. 286, 291 (N.D. Ill. 1996) (denying stay to avoid delay of investigation).

Furthermore, it is rare for the EEOC to seek relief in the district court, which in turn makes appeals a rarity. The EEOC filed only 28 subpoena enforcement actions in 2016, compared to 33 in 2005. *See* EEAC Br. 18–19. For perspective, the EEOC had an inventory of 73,500 charges at the end of 2016. *Id.* at 18. Among those few actions, the parties do not claim (much less demonstrate) that appeals are more frequent in the Ninth Circuit, where *de novo* review is available. Unlike Rule 11 sanctions, where this Court concluded that *de novo* review might encourage marginal appeals of rulings "rooted in factual determinations," *Hartmarx Corp.*, 496 U.S. at 401, 404, here the inquiry is predominantly legal. Few employers with good arguments that the EEOC overstepped its bounds are likely to be deterred from pursuing an appeal because review will be for abuse-of-discretion (especially if they can assert legal errors that are reviewed without deference as *per se* abuses of discretion).

The parties and *amici* also advance the false notion that a deferential standard streamlines appellate review, purportedly avoiding wasteful replication of the district court's fact-intensive determination. Pet. Br. 28–29; Resp. Br. 30; EEAC Br. 11–12. As shown *supra* at 22-29 and 42-45, the characterization of the district court's inquiry as fact-intensive is incorrect. Regardless, abuse-of-discretion review does not mean that an appellate court can dispose of the appeal more speedily. It still must conduct careful review of the law, the record, and the arguments of the parties. The standard of review only affects the deference it must ultimately give to the district court's ruling.

At the end of the day, an enforcement action presents the question of the respondent's duty to comply with the subpoena, and the district court must enforce that subpoena to the extent it is "in accordance with law." 5 U.S.C. § 555(d). An appellate court properly reviews that determination *de novo*.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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ADDENDUM

ADDENDUM

UNITED STATES CODE

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES

PART I. THE AGENCIES GENERALLY

CHAPTER 5. ADMINISTRATIVE PROCEDURE

SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

§ 555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer

the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.